

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NUMBER 226 OF 2019

**LIWANYA CONSTRUCTION AND GENERAL
SUPPLIES COMPANY LIMITED.....1ST
PETITIONER/APPLICANT/DECREE-HOLDER**

**JAMES NJERU MWANIKI..... 2ND
PETITIONER/APPLICANT/DECREE-HOLDER**

VERSUS

**KENYA NATIONAL HIGHWAY AUTHORITY.... 1ST
RESPONDENT/JUDGMENT-DEBTOR**

**NATIONAL TRANSPORT AND SAFETY AUTHORITY.....
.....2ND RESPONDENT**

AND

**KENYA COMMERCIAL BANK KENYA LTD, INDUSTRIAL AREA
BRANCH.. GARNISHEE**

R U L I N G

1. The applicant, (the Judgment Creditor/Decree Holder herein) filed the Notice of Motion Application dated 17th March, 2025 supported by the affidavit of Henry Kamau Nyaga of even date seeking orders that: -

i) THAT the Honourable Court be pleased to order that the monies held by the Garnishee,

KCB Bank Kenya Limited Industrial Area Branch, on behalf of the Judgment-Debtor in A/C No. 1114840149 at the

Garnishee Industrial Area Branch be and is hereby attached to answer the decree herein plus costs of these Garnishee proceedings.

ii) THAT the Garnishee herein do appear before the Honourable Court on the day of2025 to show cause why it should not pay to the Decree-Holder the debt due from it to the Judgment-Debtor, being monies/funds held in A/C No. 1114840149 at the Garnishee Industrial Area Branch, or so much thereof as may be sufficient to satisfy the decree herein plus the costs of these Garnishee proceedings.

iii) THAT the costs of this application be provided for.

2. The application is supported by the affidavit of **Henry Kamau Nyaga** sworn on 17th March, 2025.
3. The deponent swore that the Applicant/Decree Holder has a Judgment against the Judgment Debtor for Ksh.2,000,000/- entered on 29th July, 2021. Further, that costs were taxed and certificate of costs issued on 14th October, 2022 for Kshs.172,615/- and that the entire decretal amount and costs have not been settled.

4. He stated that he is aware that the Judgment-Debtor maintains a Bank Account Number 1114840149 with the Garnishee Industrial Area Branch with a Credit balance that is capable of settling the decretal amount and the adjudged costs hence the instant application.
5. On 20th September, 2025, this court directed that the physical service of the notice of motion application be effected on the Judgment- debtor and Garnishee and a return of service to be filed.
6. On 12th November, 2025, the Garnishee appeared through counsel but the judgment debtor did not. The court confirmed that physical service has been effected as directed. The Garnishee was given 14 days within which to file a response, and the parties to thereafter exchange submissions and return to court on 24th February, 2026.
7. On 24th February, 2026, the applicant informed this court that his application was undefended. M/s Watitu for Garnishee, told this court she could not put any response because the applicant had not served the Order *nisi*. Nevertheless, she had no objection to the issuance of *Garnishee-Absolute*.

8. The issue in my view is not whether the Garnishee objects to the issuance of the order of *Garnishee-Absolute*; rather, the issue is whether the procedure prescribed by the law for issuance of Garnishee absolute order has been complied with fully for only then, can this Court properly exercise its the jurisdiction to issue *Garnishee-Absolute Order*. It is now trite law, that jurisdiction is not conferred by consent of the parties or absence of any objection. A Garnishee Absolute is issued upon compliance with the strict procedure prescribed for the issuance of the Garnishee absolute Order. Order 23 of the Civil Procedure Rules prescribes the statutory procedure for attachment of debts. Order 23 Rule 1-subrule 1, 2 and 3 as follows:

ATTACHMENT OF DEBTS [Order 23, Rule 1.]
Order for the attachment of debts

- (1) A court may, **upon the ex parte application of a decree- holder**, and either before or after an oral examination of the judgment- debtor, and upon affidavit by the decree holder or his advocate, stating that a decree has been issued and that it is still unsatisfied and to what amount, and that another person is indebted to the judgment-debtor and is within the jurisdiction; order that all debts (other than the salary or allowance coming within the provisions of Order 22, rule 42 owing from such third person (hereinafter called the “garnishee”) to the judgment-debtor shall be attached to answer the decree together with the costs of the garnishee proceedings; and by the same or any subsequent order it may be ordered that the

garnishee shall appear before the court to show cause why he should not pay to the decree- holder the debt due from him to the judgment-debtor or so much thereof as may be sufficient to satisfy the decree together with the costs aforesaid.

(2) **At least seven days before the day of hearing the order nisi shall** be served on the garnishee, and, unless otherwise ordered, on the judgment-debtor.

(3) Service on the judgment-debtor may be made either at the address for service if the judgment-debtor has appeared in the suit and given an address for service, or on his advocate if he has appeared by advocate, or if there has been no appearance then by leaving the order at his usual residence or place of business or in such manner as the court may direct.

(4) **An order nisi shall be in Form No. 16 of Appendix A.**

9. It means therefore for a Garnishee absolute Order to be issued the **order nisi** in the prescribed form- **Form No. 16 of Appendix A** must, as a precondition, be shown to have been served on the garnishee. The omission to comply with this procedural step is fatal, as the purpose of *order nisi* is to ensure that, pending show the cause by the garnishee, the debts of the judgment debtor in the hands of the garnishee are 'freezed' or attached, so that the garnishee does not extinguish them and so that they may be used afterwards to

satisfy the decretal amount if cause is not shown by the garnishee and a Garnishee Absolute Order is issued.

The above is what is captured under (**[Order 23, Rule 3.] on the effect of garnishee order**, which states

*'3. Service of an order that debts due to a judgment-debtor liable under a decree shall be attached, or notice thereof to the garnishee in such manner, as the court may direct, **shall bind such debts in his hands.**'*

10. If this procedural step is skipped therefore, the implication is that there will be no binding obligation placed on the Garnishee binding any property of the judgment debtor in its hands to warrant issuance and/or execution of the *garnishee absolute*.

[Order 23, Rule 4.] Execution against garnishee.

4. If the garnishee does not dispute the debt due or claimed to be due from him to the judgment-debtor, or, if he does not appear upon the day of hearing named in an order nisi, then the court may order execution against the person and goods of the garnishee to levy the amount due from him, or so much thereof as may be sufficient to satisfy the decree, together with the costs of the garnishee proceedings; and the order absolute shall be in Form No. 17 or 18 of Appendix A, as the case may require.

11. It is manifest that the threshold for issuance of the garnishee order absolute in this case as not been fulfilled given the failure to serve the *order nisi* in the prescribed form, (**Form 16 of Appendix A**). As a result, an order for garnishee absolute cannot issue in the circumstances.

12. Consequently, there are no debts belonging to the judgment debt in the hands of the Garnishee that have been bound or preserved by an order of attachment which can be applied towards satisfaction of the decree considering that the order nisi in the prescribed form- Form 16 of Appendix A was never served. It is only after securing the debt by order nisi that the Garnishee can be required to show cause. This did not happen in view of the failure to comply with the initial mandatory procedural requirement. Without service of *order nisi* which must precede the granting of the garnishee the opportunity to show cause as a condition for issuance of the garnishee absolute, any ensuing order of garnishee absolute would be irregular.

13. I, therefore, decline to issue the order for *garnishee-absolute* and strike out this application for the reasons aforestated. The applicant can re-file the application and ensure full compliance with the prescribed procedure for issuance of *garnishee-absolute* order as set out in the Civil Procedure Rules

Dated, signed and delivered virtually at Nairobi this 4th day of March, 2026.

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L N MUGAMBI

JUDGE

ORIGINAL